Supreme Court, U. S.
FILED
FEB 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1159

IRVIN HALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

KENNETH MICHAEL ROBINSON
The Judiciary Square
306 Sixth Street, N.W.
Washington, D.C. 20001
Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRIN..ING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 3

ARGUMENT:

I. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES AFTER IT HAD INFORMED APPELLANT THAT NO CONSECUTIVE SENTENCES WOULD BE IMPOSED, THEREBY INDUCING APPELLANT TO STIPULATE TO THE GOVERNMENT'S EVIDENCE ON THREE COUNTS OF THE INDICTMENT 10

II. THE TRIAL COURT ERRED IN CONSIDERING HIGHLY INFLAMMATORY HEARSAY ALLEGATIONS CONTAINED IN THE SUPPLEMENTAL PRESENTENCE REPORT 15

CONCLUSION 20

CERTIFICATE OF SERVICE 20

APPENDIX A 1a

APPENDIX B 1b

APPENDIX C 1c

TABLE OF AUTHORITIES

Cases: *Page*

Brady v. United States, 397 U.S. 742 (1970) 12

Correale v. United States, 479 F.2d 947 (1st Cir. 1973) 13

Gore v. United States, 375 U.S. 386, 393 (1958) 15

Heflin v. United States, 358 U.S. 415 2

Mills v. Alabama, 384 U.S. 214 2

Payne v. United States, 508 F.2d 1391 (5th Cir. 1975) 11

*Santobello v. New York, 404 U.S. 257, 262 (1971) 12,13,14,19

*United States v. Bass, 175 U.S. App. D.C. 282, 535 F.2d 110 (1976) 7,16,17,19

*United States v. Brown, 500 F.2d 375 (4th Cir. 1974) 14

United States v. Gervato, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973) 11

United States v. Read, 534 F.2d 858, 859 (9th Cir. 1976) 15

United States, ex rel. Selikoff v. Comm'r of Correction of the State of New York, 524 F.2d 650 (2d Cir. 1975) 12

*United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) 16,17

Williams v. New York, 337 U.S. 241 (1949) 15

*Cases chiefly relied upon are marked by asterisks.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

IRVIN HALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The petitioner, Irvin Hall, respectfully requests that a writ of certiorari be issued to review the judgment and order of the United States Court of Appeals entered on December 22, 1977.

OPINIONS BELOW

On October 29, 1976, petitioner waived his right to trial by jury and entered a stipulated finding of facts

and the court found petitioner guilty of four counts charged under the Controlled Substance Act, 21 U.S.C. §841. On February 4, 1977, the court sentenced petitioner to fifteen (15) months to five years on counts 1 and 2, six (6) months on each of counts 3 and 4, said sentences to run concurrent to one another and consecutive to the sentence imposed on count one. An appeal followed and denied on December 22, 1977. Appellant counsel was not retained for purposes of the petition to the Supreme Court and consequently the petition was not filed within 30 days. Petitioner is presently on bond pending this petition.

JURISDICTION

This Court has jurisdiction despite the failure of petitioner to file within the prescribed thirty days pursuant to *Schacht v. U.S.*, 394 U.S. 58, 63; see also, *Heflin v. U.S.*, 358 U.S. 415, pg. 418 (M.7) and because petitioner herein concedes that there is nothing left to be tried in any further proceedings. See *Mills v. Alabama*, 384 U.S. 214; 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Whether the trial court erred in imposing consecutive sentences after informing petitioner, prior to his agreement to stipulate to the government's evidence, and at a time when the court was aware that the government and the defense were disputing as to how many counts would be included in such a

stipulation, that no consecutive sentences would be imposed?

2. Whether the trial court erred when, in determining its sentence, it considered highly damaging hearsay allegations contained in a supplemental presentence report?

STATEMENT OF FACTS

On July 13, 1976 petitioner was charged in a four count indictment with possession with intent to distribute a controlled substance (heroin) [21 U.S.C. §841(a)], and unlawful possession of narcotic drugs (heroin, cocaine and marijuana) [33 D.C. Code §402].

The evidence against petitioner was seized from his apartment pursuant to a United States Magistrate's search warrant which was executed on June 17, 1976 (App. at 6).[2] On August 6, 1976 appellant filed a motion to suppress the seized evidence primarily on the ground that the police, after having arrived at his apartment, waited for approximately thirty minutes until he had vacated the apartment before executing the warrant. The motion was heard and taken under advisement on October 26, 1976.[3] On that date the

[2] References to the record other than the transcript will hereinafter be abbreviated as "App."

[3] On November 17, 1976 the trial court ruled that the police conduct was reasonable, especially since they had information that petitioner had in his apartment a dog with vicious propensities. Thus, the court found that the police waited until the apartment was vacant for their own protection. (Tr. III, 3-10.) This ruling was not challenged on appeal.

trial court inquired if the case would go to trial in the event the motion to suppress were to be denied. The following colloquy took place between the court, the prosecutor and petitioner's trial counsel:

> THE COURT: What will happen if I rule against him? Is he going to trial?
>
> MR. BENNETT [counsel for defendant]: No, we had anticipated, and I talked to [the prosecutor], and I have drawn up here because, of course, when Your Honor postponed the hearing on the motion to today, which was the trial date, we had to be prepared to go whatever way Your Honor went.
>
> THE COURT: Yes.
>
> MR. BENNETT: So we have prepared and defendant has read and is prepared to execute a stipulated set of facts. . . .
>
> . . . .
>
> MR. BENNETT: . . . in effect to the first count of the indictment, which is the possession with intent to distribute. Go nonjury.
>
> THE COURT: Would you object to nonjury?
>
> THE PROSECUTOR: I wouldn't object to nonjury, but I think, as I mentioned to Mr. Bennett, although the first count is the lead count, I would think that the entire indictment ought to be submitted to the Court even though the other counts are misdemeanor counts.
>
> THE COURT: You would object?
>
> THE PROSECUTOR: I would not object to a nonjury. I would have no problem with a nonjury, Your Honor, with a stipulated set of facts as to each of the counts of the indictment rather than just to the lead count.
>
> There are four counts.

> The third and fourth are misdemeanors, but lesser included.
>
> They are separate and distinct drugs.
>
> I think just as a matter of simple propriety, they are all in the indictment.
>
> THE COURT: *Mr. Bennett, if I enter a finding of guilt, there certainly wouldn't be any consecutive sentences.* (Tr. I, 225-227) (emphasis supplied).

Thereafter, on October 29, 1976 petitioner waived his right to trial by jury on Counts I, III and IV of the indictment and stipulated that the following drugs were seized from his apartment:

(a) 9,501.3 milligrams of heroin. (19% pure)
(b) 1,209 milligrams of heroin. (34.9% pure)
(c) 647.9 milligrams of cocaine. (21.4% pure)
(d) 2,210 milligrams of marijuana.

Appellant further stipulated that:

> "On June 17, 1976, the street percentage of heroin was between 3% and 5%. Based on the quantity and quality of the narcotic drugs that were seized on June 17, 1976, it is stipulated that the heroin and cocaine were not maintained by the defendant solely for his personal use." (App. at 12)

In exchange for this stipulation, the prosecutor promised that he would not file a written allocation memorandum at the time of petitioner's sentencing (Tr. IV, 19).

On December 20, 1976 petitioner appeared before the trial court for sentencing. A presentence report had been prepared by the probation office and reviewed by trial counsel (Tr. IV, 3). That report noted that petitioner had no prior criminal record, had received an

honorable discharge from the Air Force in 1972 and had a generally good employment history (sealed exhibit). It also noted that petitioner had begun using narcotics while he was stationed with the Air Force in Thailand in 1971, and had since had a continuing problem with narcotics abuse. *Id.* The report noted that appellant had emphasized that he was not a large scale dealer in narcotics, but rather sold narcotics only to a group of four or five friends and associates. *Id.* During the sentencing hearing the court expressed concern over the quality of the seized drugs. Petitioner stated that he did not know the quality of the drugs he had purchased and that such information was not pertinent to those, like him, who consumed narcotics by inhalation. (Tr. IV, 11-13.)

At that point the prosecutor brought the court's attention to the affidavit that had been filed in support of the search warrant and stated:

> As the Court can see from that search warrant, the information from the sources of information did not simply say that the defendant sold to friends or sold occasionally. I believe it was one (sic) classified him as a dealer in high-level narcotics. High purity narcotics. (Tr. IV, 14-15.)[4]

[4] The affidavit of Detective Vislay of the Metropolitan Police Department had reported information received from three purportedly reliable informants, S-1, S-2 and S-3. S-1 reported that petitioner was selling "high quality heroin" from inside his apartment. He also reported that he had purchased heroin from petitioner on at least three prior occasions both from inside petitioner's apartment and from inside the liquor store at which petitioner was employed. S-1 also reported that petitioner was in partnership with one "Joe Jackson". S-2 reported that petitioner was the supplier of heroin to S-2's source of heroin. S-3 reported that petitioner was a partner of Joe Jackson, and was selling

(continued)

Trial counsel objected to the information in the affidavit, citing the case of *United States v. Bass*, 175 U.S. App. D.C. 282, 535 F.2d 110 (1976), and pointing out that the statements in the affidavit were hearsay, impossible to cross-examine, and disputed by petitioner (Tr. IV, 15). The trial judge stated that he had not previously considered the affidavit for purposes of sentencing, and then inquired as to what other information the prosecutor wished to offer (Tr. IV, 18). The prosecutor then pointed out that petitioner had a joint bank account with one Schuessler Watts who had been previously convicted of narcotics violations in the District of Columbia (Tr. IV, 21). At this point the court ordered the probation department to "give me a complete report on this," and postponed the sentencing (Tr. IV, 22).

On January 21, 1977 the probation office submitted a supplemental presentence report to the trial court. The report noted that based upon his investigation Detective Vislay of the Metropolitan Police Department narcotics squad, had the "feeling" that petitioner was a "major factor in the drug operations of Joseph Jackson" (sealed exhibit). Vislay further believed that

(footnote continued from preceding page)

heroin at the liquor store and his apartment, where petitioner allegedly kept 1-2 ounces of heroin.

During the proceedings in this case S-1 was identified as one Leroy Fraser. On February 4, 1977, petitioner acknowledged that he had considered Fraser to be a friend of his and had sold drugs to him (Tr. V, 28-29). However, he denied that he was in partnership with Joe Jackson and denied that he had sold drugs to Fraser from inside the liquor store (App. 14). The prosecutor reported that Fraser had been shot and killed by a police officer during the pendency of this case (Tr. IV, 14, 16).

petitioner was a "go-between" between Jackson and street level dealers, a position that Vislay stated had been previously occupied by Schuessler Watts. *Id.* Vislay further reported, according to the supplemental presentence report, that he had received allegedly reliable information from a police officer in Winnsboro, South Carolina, that petitioner was a supplier of narcotics to petitioner's brother in Winnsboro. *Id.*

The report contained further information from Agent McCracken of the Drug Enforcement Administration that petitioner was an associate of Schuessler Watts and that he dealt in 1/2 pound and 1 pound lots of heroin. *Id.* However, the report went on to say that "DEA has not developed their case to the point where they can prosecute the subject at this time." *Id.* The report also revealed that petitioner and Watts had opened a joint bank account in July, 1975 with a $600 deposit. This was supplemented with another $600 in August, 1975. Between August, 1975 and August, 1976 the funds in this account were withdrawn usually in amounts of less than $70. *Id.*

On February 1, 1977 petitioner filed a "Motion For Protective Order, To Bar Court From Consideration of Supplemental Pre-Sentence Report and to Bar Government's Oral Allocution." In this motion petitioner, through counsel, specifically and categorically denied each of the allegations made by Detectives Vislay and Agent McCracken (App. at 14). Petitioner attached to this motion a sworn statement from the policeman in Winnsboro denying key allegations made by Vislay and stating that the information he had given had not been correctly represented. *Id.* Trial Counsel argued that the supplemental report was filled with highly inflammatory

hearsay statements which were categorically denied by petitioner, and that it would be unfair to place the burden of refutation of these allegations of petitioner. Accordingly counsel urged the court not to consider the supplemental report, and to consider only the information developed at the motions hearing, the non-jury trial and in the affidavit in support of the search warrant. *Id.*[5]

At the February 4, 1977 sentencing hearing trial counsel again argued that his client's due process rights were being infringed by the hearsay allegations in the supplemental presentence report (Tr. V, 8-11). The prosecutor conceded that because of the apparent unreliability of the information from South Carolina, the government would not rely on that information (Tr. V, 4). No such statement was made with respect to the information from Vislay and McCracken. The trial court stated that he could sentence petitioner based upon the quality and quantity of the drugs, regardless of the supplemental presentence report (Tr. V, 5, 7). However the court apparently relied upon the allegations in the report, including the allegations of Detective Vislay regarding petitioner's position in the alleged Joseph Jackson narcotics operation (Tr. V, 10-11). Trial counsel pointed out that Vislay's information had come from Leroy Fraser, who was dead, that petitioner denied the information, and could not refute it by cross-examining Detective Vislay. The prosecutor proffered that Vislay could testify that Fraser had

---

[5] Petitioner thus withdrew his earlier objection to consideration of information in the affidavit in support of the search warrant.

purchased heroin inside the liquor store at a time when petitioner and others were present (Tr. V, 14-19). The prosecutor conceded that Vislay had no first-hand knowledge that petitioner was associated with the alleged Jackson operation (Tr. V, 15).

The trial court then questioned petitioner regarding the joint bank account. Petitioner explained that Watts had asked him to help his family financially during Watts' incarceration (Tr. V, 23). Petitioner further explained that the quality of the drugs was not a significant factor to one who ingested them by inhalation; he informed the court that he and others had inhaled 98% pure heroin while he was in the Air Force in Thailand (Tr. V, 27-28).

The trial court then proceeded to sentence appellant as set forth above.

ARGUMENT

I.

THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES AFTER IT HAD INFORMED PETITIONER THAT NO CONSECUTIVE SENTENCES WOULD BE IMPOSED, THEREBY INDUCING PETITIONER TO STIPULATE TO THE GOVERNMENT'S EVIDENCE ON THREE COUNTS OF THE INDICTMENT.

In this case, in order to preserve his right to appeal an adverse ruling on his motion to suppress evidence, petitioner stipulated to the government's evidence with

respect to three counts of the indictment.[6] By doing this appellant waived his Sixth Amendment rights to trial by jury and to confront his accusers, and his Fifth Amendment rights to remain silent and to present witnesses in his own defense. Petitioner's action, like a plea of guilty, obviated any need for a trial of the case on the merits, and resulted in a speedy resolution of the case in the trial court.

In exchange for taking this action, petitioner was promised that the government would not present any written allocution memoranda to the court at the time of sentencing. Moreover, prior to petitioner's waiver of these rights, the trial court made a specific commitment to the petitioner that he would not impose consecutive sentences if petitioner stipulated to evidence concerning counts other than the first count of

---

[6] The principle thrust of petitioner's argument with respect to the search and seizure was that the police after having arrived at his apartment, and being in a position to execute the search warrant, failed to do so until he had departed (App. 6, 8). The government argued that this issue was controlled by *United States v. Gervato*, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973) and *Payne v. United States*, 508 F.2d 1391 (5th Cir. 1975), which clearly hold that searches of unoccupied dwellings do not violate the Fourth Amendment (App. 7). Appellant argued that *Gervato* and *Payne* were distinguishable because there the police arrived at the defendant's homes with the search warrants *after* the defendants had left the homes (App. 8).

The trial court held extensive hearings on this issue and found not only that *Gervato* and *Payne* controlled, but also that, because of the known presence of a vicious dog, the police acted reasonably for their own protection in waiting until petitioner and the dog had departed. Appellate counsel did not pursue said issue on appeal but petitioner prefers that counsel raise it here as a footnote argument.

the indictment. The government voiced no objection when the court made this commitment, which was a material inducement for the entry of the stipulation. Thereupon, petitioner's trial counsel withdrew his objection to stipulating to evidence on counts three and four, and subsequently, petitioner stipulated to the evidence on those counts, as well as to count one. Thereafter in contravention of its previous commitment, the trial count imposed consecutive sentences as noted above.

In *Santobello v. New York*, 404 U.S. 257, 262 (1971), the Supreme Court noted that, "When a plea rests in any significant degree on a promise or agreement of the prosecution, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Moreover, it is clear that promises made by the court that induce a guilty plea must also be fulfilled. *United States, ex rel. Selikoff v. Comm'r of Correction of the State of New York*, 524 F.2d 650 (2d Cir. 1975). In *Brady v. United States*, 397 U.S. 742 (1970), the Court stated:

> "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by misrepresentation (including unfulfilled or unfulfillable promises). . . ."

While a guilty plea is not involved in the case at bar, precisely the same interests and rights of the accused are at stake when a criminal defendant agrees to stipulate to the government's evidence and forego the

exercise of constitutionally guaranteed rights.[7] That the breach of agreement was inadvertent or made in apparent good faith does not lessen its impact. *Santobello, supra*; see also, *Correale v. United States*, 479 F.2d 947 (1st Cir. 1973).

Here, the trial court failed to abide by its previous commitment that no consecutive sentences would be imposed. The record is clear that such a commitment was made by the court and not opposed by the government and that the commitment was a material inducement to petitioner's waiver of his rights with respect to two counts of the indictment. It is also clear that the promise was unfulfilled. Thus, the consecutive sentences on counts three and four were not legally imposed.

If this Court finds, as we urge it must, that there was a breach of the agreement not to sentence petitioner to consecutive terms, the question of the appropriate relief on remand remains to be resolved. In *Santobello, supra*, the defendant sought an order from the Supreme Court vacating his sentence and allowing him to withdraw his guilty plea so that he might stand trial. Though vacating

---

[7] In his concurring opinion in *Santobello*, Justice Douglas stated that:

> "a guilty" plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial . . . to confront one's accusers . . . to present witnesses in one's defense . . . to remain silent . . . and to be convicted by proof beyond a reasonable doubt" *Id.* at 264 (citations omitted).

By agreeing to stipulate to the government's evidence, appellant similarly waived all but one of these rights.

the sentence the Court remanded the case to the state courts to permit them to choose whether there should

> "only . . . be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i.e.*, the opportunity to withdraw his plea of guilty." 404 U.S. at 263.

Here, as in *United States v. Brown*, 500 F.2d 375 (4th Cir. 1974), petitioner does not seek to withdraw his stipulation to evidence relating to counts three and four, but rather seeks to have the trial court fulfill its agreement not to impose consecutive sentences. As the court stated in *Brown:*

> In the instant case, defendant does not seek to withdraw his guilty plea, but only asks the lesser relief of 'specific performance' of the plea bargain. We thus have no need to consider a choice of remedies. In light of defendant's position, we conclude that a remand for resentencing before a different district judge, after full compliance with the terms of the plea bargain, follows *a fortiori* from *Santobello. Id.* at 378.

II.

THE TRIAL COURT ERRED IN CONSIDERING HIGHLY INFLAMMATORY HEARSAY ALLEGATIONS CONTAINED IN THE SUPPLEMENTAL PRESENTENCE REPORT.

There have been a plethora of recent challenges in the federal courts to information contained in presentence reports.[8] These challenges continue a trend toward increased appellate review of the sentencing process and increased restrictions on the sentencing judge's broad discretion. The general rule is that federal sentences are not reviewable, *Gore v. United States*, 375 U.S. 386, 393 (1958), and that the sentencing judge may draw upon various sources of information in determining what sentence should be imposed. *Williams v. New York*, 337 U.S. 241 (1949). However, the circuit courts, while continuing to recognize the rule that sentences are generally not reviewable, have imposed some restrictions concerning the type of material that may be included in the presentence reports and the discretion of the sentencing judge. See *United States v. Read*, 534 F.2d 858, 859 (9th Cir. 1976).

---

[8] See generally Blake, "Appellate Review of Criminal Sentencing in the Federal Court," 24 Kan. L. Rev. 279 (1976); Coffee, "The Future of Sentencing Refore: Emerging Legal Issues in the Individualization of Justice," 73 Mich. L. Rev. 1362, at 1435-40; Note, "Appellate Review of Sentences and the Need for a Reviewable Record," 1973 Duke L. J. 1357.

The Court of Appeals for the District of Columbia circuit recently held that certain types of inherently unreliable information should be either verified or excluded from presentence reports. *United States v. Bass*, 175 U.S. App. D.C. 282, 535 F.2d 110 (1976). In *Bass, supra*, the government filed a written memorandum with the court prior to sentencing in which it alleged that agents of the Drug Enforcement Administration "knew" the defendant to be a "persistent narcotic trafficker in the Washington area." 175 U.S. App. D.C. at 289, 535 F.2d at 117. The memorandum went on to state that a narcotics agent knew defendant's supplier of drugs and described in some detail that supplier's narcotics operation. The court characterized the government's allegations as "highly damaging" going "far beyond what was proved at trial" and "most difficult to refute." 175 U.S. App. D.C. at 292, 535 F.2d at 120. Quoting from *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), a case which involved allegations against the defendant very similar to those involved here, the *Bass* Court stated:

> A sentence cannot be predicated on information of so little value as here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process. 175 U.S. App. D.C. at 292, 535 F.2d at 120.

In *Bass*, the sentence was affirmed because of the defendant's failure to deny the allegations at sentencing. 175 U.S. App. D.C. at 292-3, 535 F.2d at 120-121. Characterizing the lack of denial as a highly significant fact bearing on the reliability of the information, the

Court urged the appellant to submit a rule 35 motion to contest the presentence information. *Id.*

The allegations made against appellant in the supplemental presentence report in the case at bar were essentially the same as the allegations made against the defendants in *Bass* and *Weston, supra.* The report alleged that Detective Vislay believed appellant to be involved in the Jackson narcotics operation and had received allegedly reliable information that petitioner supplied drugs to his brother in South Carolina. Moreover, the supplemental report noted that an agent of the Drug Enforcement Administration reported that petitioner was associated with Schuessler Watts, an allegedly major narcotics trafficker, and that he dealt in large quantities of narcotics. There can be no doubt that these allegations were "highly damaging, went far beyond what was proved at trial, and were most difficult to refute." *Bass, supra*. Unlike the defendant in *Bass*, however, petitioner vigorously denied before the trial court each and every allegation contained in the supplemental presentence report. The allegedly reliable information regarding appellant's dealings in South Carolina, the only proffered "evidence" that lent itself to demonstrable refutation, was so effectively negated that the government was forced to concede its unreliability (Tr. V, 4). The other proffered information from Vislay was apparently based upon information from S-1, Leroy Fraser, an allegedly reliable informant, who was shot and killed by police officers prior to

petitioner's sentence.[9] There is no indication in the record of the source of Agent McCracken's highly damaging allegations. Although there was some verification that petitioner was associated with Schuessler Watts, due to the records of the joint bank account, there was no verification whatsoever for McCracken's allegation that petitioner dealt in large quantities of heroin. Moreover, McCracken conceded that he did not have a prosecutable case against petitioner. Petitioner denied McCracken's allegations and explained that the joint account was not used for illicit purposes. It was shown that the account never contained more than $1,200. This fact, and the number of small withdrawals from the account provides support for petitioner's explanation that he was using the money to assist Watts' family, and not for the purchase of large quantities of drugs.

While the trial court indicated at petitioner's final sentencing hearing on February 4, 1977, that it was able to sentence appellant based only upon the quality and quantity of the drugs without regard to the supplemental presentence report (Tr. V, 5, 7), it is evident that it considered the tainted report since at the same hearing the trial court and the prosecutor referred to the allegations of Vislay, regarding appellant's

[9] It is unclear to what extent the trial court relied upon the information allegedly supplied by Fraser which was recited in the affidavit in support of the search warrant. However, since Fraser was killed by the police, his unavailability and apparent unreliability due to the circumstances of his death, should have precluded consideration of this information for purposes of sentencing.

position in the alleged Jackson narcotics operation (Tr. V, 10-11). Although it is true that the trial court was concerned at the first sentencing hearing on December 20, 1976 about the quality and quantity of the drugs involved, it did not sentence petitioner then, but rather ordered that the supplemental report be prepared. Thus, it is apparent that the court was influenced by the allegations in that report. This influence is further indicated by the trial court's imposition of consecutive sentences, after his prior commitment not to impose consecutive terms.

At any rate, under the circumstances presented here, it is not incumbent upon petitioner to demonstrate that the sentencing court actually was influenced by the allegations which were improperly before it. Indeed, in *Santobello, supra*, the sentencing court stated on the record that it was specifically disregarding information which was improperly before it. Nonetheless, the Supreme Court held that in the interest of justice the sentence could not stand.

In essence this case is indistinguishable from *Bass*, except that here petitioner denied the highly damaging allegations made by the government. Accordingly, we submit that this case must be remanded for resentencing at which the sentencing court is precluded from considering the highly damaging, unverified and prejudicial information contained in the supplemental presentence report, and the allegations made by the deceased informant Leroy Fraser, and at which consecutive sentences may not be imposed.

CONCLUSION

Wherefore, it is respectfully requested that the instant Petition for Writ of Certiorari be granted.

Very respectfully submitted,

KENNETH MICHAEL ROBINSON
The Judiciary Square
306 Sixth Street, N.W.
Washington, D.C. 20001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for Writ of Certiorari was mailed, postage paid, to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530, on this 15th day of February, 1978.

KENNETH MICHAEL ROBINSON

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES

File No.

IRVIN HALL,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF PETITIONER FOR WRIT OF CERTIORARI

DISTRICT OF COLUMBIA) ss.:

I, IRVIN HALL, do hereby attest and swear that the petition for writ of certiorari filed this day by my counsel in the Supreme Court for the United States of America is filed in good faith and with the firm belief that the issues raised by counsel are issues which should necessitate a reversal of my present conviction before the HON. Judge Parker sitting in the Federal Court for the District of Columbia.

Your affiant further swears that he has discussed in great detail each of the issues raised by counsel in this petition and that your affiant believes that this petition must be filed. It was only after a misunderstanding on my part of that your affiant failed to have retained counsel more timely to file this petition and it is for that reason that said petition is filed out of time.

Affiant pleads that the Court review this petition in order that affiant can be the recipient of due process.

IRVIN HALL

Sworn to before me this
14th day of February, 1978

Alice Elizabeth Harsley
Notary Public, D.C.
My Commission expires March 31, 1978.

APPENDIX B

AFFIDAVIT OF PETITIONER'S COUNSEL

I, Kenneth Michael Robinson, hereby attest and swear that I was retained within the past two weeks in this matter and that this Petition is filed in good faith and is not filed for purpose of delay or causing the continuances of the petitioner's remaining on bond.

/s/ Kenneth Michael Robinson
KENNETH MICHAEL ROBINSON

Subscribed and sworn to before me this
14th day of February, 1978

Alice Elizabeth Harsley
Notary Public, D.C.
My Commission expires March 31, 1978.

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1272

UNITED STATES OF AMERICA

v.

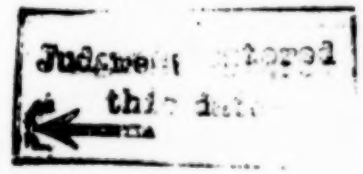
IRVIN L. HALL, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Criminal 76-412)

Argued October 17, 1977

Decided December 22, 1977



William E. Reukauf, for appellant.

Peter C. DePaolis, Assistant United States Attorney with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *E. Lawrence Barcella, Jr.*, Assistant United States Attorneys were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: BAZELON, *Chief Judge*, WRIGHT and ROBB, *Circuit Judges.*

Opinion Per Curiam.

PER CURIAM: Defendant was convicted on one count of possessing a controlled substance with intent to distribute it, 21 U.S.C. § 841(a), and two counts of possessing narcotics, 33 D.C. Code § 402. The trial judge imposed a sentence of 15 months to five years on count one (possession with intent to distribute) and six months each on counts three and four (possession). The sentences on the latter two counts were to run concurrently with each other but consecutively to the sentence on count one.

On appeal, defendant does not challenge his conviction but asserts two claims of error with respect to the sentencing process. First, he contends that the trial judge promised that no consecutive sentences would be imposed and that this promise induced defendant to waive various rights and agree to trial by the court on stipulated facts. Second, defendant contends that the trial judge improperly relied on a supplemental presentence report containing damaging and, more importantly, false hearsay allegations. Defendant therefore urges this court to remand the case to a different trial judge for resentencing.

Defendant's first argument gives us pause, since the record does contain some indication that the trial judge expressed willingness during a pretrial hearing conducted on October 26, 1976, not to impose consecutive sentences if defendant were convicted of the possession counts; and some indication that defendant stipulated to the facts underlying the possession counts in response to the trial judge's assurances. *See* Tr. I at 225-227. Sentence was not imposed until three months later, however, and at that time no argument was made that the judge had agreed not to impose consecutive sentences. Rather, de-

fense counsel commented that he thought "the sentence was fair under all the circumstances." Tr. V at 40. It is of course conceivable that, in the three month interval between the pretrial hearing and sentencing, defense counsel and the trial judge had forgotten about the asserted agreement. But we are unable to find plain error on this record, particularly in view of defense counsel's expression that "the sentence was fair." *See* F.R. Crim. P. 52(b); *cf. United States v. Sheppard*, 462 F.2d 279, 280 (D.C. Cir.), *cert. denied*, 409 U.S. 985 (1972).

Defendant's second contention concerns a problem that has troubled us on previous occasions. At the trial judge's request, the government supplied him with a supplemental presentence report containing hearsay information which defendant vigorously disputed. When called upon to verify this information, *see United States v. Bass*, 535 F.2d 110 (D.C. Cir. 1976), the government conceded its inability to do so in several respects and withdrew a portion of the report. We think the practice of submitting to the trial judge information to aid him in sentencing which the government has not verified or is unable to verify poses obvious dangers. The trial judge could rely on inaccurate or disputed information, or he could choose to ignore reliable information out of concern that the government's allocution might be questionable in its entirety.

In this case, however, the trial judge evidenced concern about the reliability of the information before him. The trial judge held a hearing during which he sought verification of the disputed allegations from the government. The trial judge made clear his attempts to ignore —to the extent humanly possible—those allegations which remained unsubstantiated. And we agree with defense counsel's observation that the sentence imposed appears fair under the circumstances.

Accordingly, we conclude that the sentencing process in this case comported with the requirements we articulated in *Bass*, *supra*, 535 F.2d at 121, and the judgment herein must therefore be

Affirmed.